SUPREME COURT, U.S.
IN THE

Supreme Court of the United States

October Term, 1970
No. 907

THE CONSOLO CORPORATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

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No. .....

THE CONOLON CORPORATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner, The Conolon Corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above case on August 4, 1970.

Citations to Opinions Below.

The Opinion of the Court of Appeals is as yet unreported, and is printed in Appendix B hereto, beginning at page 3. The Decision and Order of the National Labor Relations Board is reported at 175 N.L.R.B. No. 9 and is printed in Appendix C hereto, beginning at page 14.

Jurisdiction.

The decision of the Court of Appeals was entered on August 4, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 2101(c).

Questions Presented.

1. Did Petitioner discriminatorily apply its valid no-solicitation rule by enforcing it against bargaining-unit employees while, at the same time, utilizing mini-skirted non-bargaining unit personnel to carry on a pro-company campaign?

2. When an employee distributes literature on working time in violation of a valid no-solicitation rule, can Petitioner validly reprimand that employee without regard to whether or not said activity interferes with that employee's work or the work of other employees?

3. If an employer, during an election campaign, announces that an additional wage survey will be conducted in the future, does that announcement violate Section 8(a)(1) of the Act even though the employer is admittedly motivated by impending changes in the wage provisions of the Fair Labor Standards Act?

4. If an employer has a legal right to conduct such a wage survey as the result of changes in the Fair Labor Standards Act, can its announcement of that right to the employees ever constitute a violation of the Act?

5. Under this Court's decisions in *Great Dane*[1] and *American Ship Building*,[2] can the Board disregard Petitioner's uncontradicted economic justification for denying an employee overtime and support its finding of a Section 8(a)(3) violation of the Act on the basis of mere inference rather than a showing of independent evidence of improper motivation?

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[1] *NLRB v. Great Dane Trailers*, 388 U.S. 26, 18 L. Ed. 2d 1027 (1967).

[2] *American Ship Building Co. v. NLRB*, 380 U.S. 300, 13 L. Ed. 2d 855 (1965).

6. Did the Court of Appeals properly discharge its duty under this Court's decision in *Universal Camera*[3] by relying on Petitioner's alleged prior history of interference with employee rights to support a finding of present anti-union motivation when, in fact, the referenced activity was never adjudicated but instead resolved by a settlement agreement between the parties, which specifically contained a disclaimer of violation?

Statutes Involved.

The statutory provisions involved are Section 7 (61 Stat. 140, 29 U.S.C. § 157); Section 8(a)(1) and (3) (61 Stat. 140, 29 U.S.C. §§ 158(a)(1)(b)(3)); Section 8(c) (61 State. 140, 29 U.S.C. § 158(c)); and Section 10(b) (61 Stat. 140, 29 U.S.C. § 160(b)), of the National Labor Relations Act, as amended (61 Stat. 140, 29 U.S.C. § 151 *et seq.*). These statutory provisions are printed in Appendix A hereto, beginning at page 1.

Statement of the Case.

On December 15, 1967, a representation election was held at the request of the Industrial Union of Marine and Ship Building Workers of America, AFL-CIO (hereinafter referred to as the Union). The Union, thereafter, filed lengthy objections to Conduct Affecting the Results of the Election as well as unfair labor practice charges.

The Regional Director overruled at least half of the objections and directed a formal hearing on the remaining ones. Respondent adopted the recommendations of the Regional Director and consolidated the hearing on the objections with the hearing on the unfair labor

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[3] *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 95 L. Ed. 456 (1950).

practice charges since they were both based on the same alleged misconduct. Respondent and its Trial Examiner made findings and both rendered a decision involving the following pertinent events as more particularly set out hereinafter.

Use of mini-skirted girls and the valid no-solicitation rule: During the election campaign, Petitioner, in response to the theme set by the Union concerning "mini-pay checks," "mini-skirts" and "high boots," conceived the idea of distributing campaign literature by girls dressed in mini-skirts and high boots. Volunteers among non-bargaining unit office clericals were sought, and several girls actually volunteered. Neither the influence nor the support of Petitioner's position by these volunteers was sought. Each girl was only asked to pass out literature and was informed that she was free to express her own personal views for or against the Union. These girls were used to pass out pro-company literature at the time clock and at the plant gates.

On December 13, 1967, President Ashby delivered a speech to the day-shift employees which lasted from 3:15 to 3:25 P.M. The day shift ended at 3:30 P.M. Day-shift employee Mitsuko Roberts, who had not punched out, immediately began passing out campaign literature to fellow employees waiting in line to punch out at the time clock. Another employee, Mary Jeffers, who was waiting ahead of Roberts in the long line to punch out that day, complained to Petitioner's supervisor about Roberts being allowed to distribute campaign literature on working time. Jeffers was disturbed since she had previously been warned for such activity when she attempted to pass out pro-company literature on working time.

On December 14, 1967, Roberts was told to see President Ashby, who informed her of the complaint, advised her of Petitioner's no-solicitation rule, and warned her not to use working time again for non-working purposes. The Trial Examiner found that on two other occasions employees had been similarly warned for improper use of working time.

Based on the foregoing facts, the Trial Examiner found that since Roberts had, in fact, been passing out literature on working time, Petitioner had validly warned her for improper use of working time. The Trial Examiner further found that in view of the other warnings to other employees, Petitioner had not discriminatorily applied its rule. Respondents, however, reversed the Trial Examiner, finding specifically that Petitioner had discriminatorily applied its rule in that it had allowed the mini-skirted office clerical employees to distribute literature in the vicinity of the same time clock as the morning shift was punching in.

Petitioner's reference to an addtional wage survey: On November 6, 1967, Petitioner's President, Howard Ashby, called a meeting of all employees at which time the results of a wage survey were announced and an increase to all employees in the bargaining unit, including changes in classification, were made known. Neither the increase in wages nor the announcement of the initial wage survey or the changes in classification were alleged to have been unfair labor practices inasmuch as they followed established past practice. During the course of this meeting, President Ashby also advised the employees that an additional wage survey would be conducted some time after the first of the year. He did not promise any wage increase nor imply

that any would be forthcoming as the result of this survey. Wages would, as the Trial Examiner found, be adjusted only if necessary in light of the survey findings. The Trial Examiner also found that Petitioner, prior to the November 6 meeting, considered the possibility of making a wage increase that would take into account changes in the Fair Labor Standards Act due in February, 1968. He found that the majority of Petitioner's wage committee felt that the additional increase indicated by the change in said law should be made in November along with the increase being given then, but since the representation election was pending, the President and Vice President overruled the committee on the grounds that any further increase could not be supported on the basis of past practice and would make Petitioner vulnerable to an unfair labor practice charge.

The Trial Examiner additionally found that Petitioner chose to postpone any further increase until the effective date of the Fair Labor Standards Act changes. The announcement of the survey to be conducted early in 1968 was made before the December 15, 1967 election date had been selected. Moreover, this announcement was the only reference to the survey made by Petitioner during the period preceding the election. Nonetheless, the Trial Examiner, with Respondent's subsequent affirmance, held that the reference to the survey contained an expectation of a wage increase and, therefore, constituted a violation of Section 8(a)(1) of the Act.

The alleged coercive statements made to employee Jones: Some time in November, approximately a month before the election, employee Larry Jones, a specialty fishing rod builder, on his own initiative, went to the

office of Vice President Barrie for the specific purpose of discussing his unhappiness with his present wages and classification. This rather lengthy conversation was devoted exclusively to a discussion of Jones's future with Petitioner. The only reference to the Union occurred when Jones voluntarily told Barrie that he had attended Union meetings and was interested in hearing both sides of the story. Although Barrie denied it, the Trial Examiner found that he told Jones that if he, Jones, were for Petitioner, he would move up in position. The Trial Examiner's finding that this statement constituted a violation of Section 8(a)(1) of the Act was subsequently affirmed by Respondent.

The alleged denial of overtime to Jones: On December 14, 1967, employee Jones, along with several other employees, wore a shirt with pro-union insignia printed on it. Jones was told by his immediate superior at the end of his shift, that there was no overtime work for him that day. He was told that the special rods on which he was working could not be shipped because of a shortage of the aluminum cases into which the rods had to be placed for shipment. Jones did not believe his superior and went to see Vice President Barrie that evening to discuss his denial of overtime. This conversation with Barrie lasted approximately one and one-half hours and Jones received overtime pay for this period of time.

With the exception of the evening of December 14, 1967, Jones regularly worked overtime that week and the following week but for one day. Nonetheless, the Trial Examiner, with the subsequent affirmance of Respondent, found that Jones was denied overtime because of his Union activities in violation of Section 8(a)(3) of the Act.

As a result of the foregoing, Petitioner appealed Respondent's decision to the Court of Appeals under Section 10(f) (29 U.S.C. § 160(f)) of the Act (29 U.S.C. § 151 *et seq.*). Respondent filed a cross-application for enforcement. The Court of Appeals affirmed Respondent on all of the foregoing points. It reversed Respondent with respect to the holding of Respondent that the use of mini-skirted clericals—*per se*—violated the Act and that certain conduct of one mini-skirted girl was improper.

Reasons for Granting the Writ.

1. The Decision That Petitioner Discriminatorily Enforced Its No-Solicitation Rule by Use of Its Mini-Skirted Girls Is Incompatible With Prior Decisions of This Court and Also Presents a Question of Continuing Significance to the Proper Administration of the Act.

Respondent's decision on this point is contrary to this Court's decision in *NLRB v. United Steelworkers*, 357 U.S. 357, 2 L. Ed. 2d 1383 (1958). In *Steelworkers*, like the instant case, Respondent did not contest the validity of the no-solicitation rule, but instead based its decision on discriminatory enforcement. Two separate cases were before the Court in *Steelworkers* and in both the evidence established that the employers were using supervisory personnel to conduct a pro-company campaign while they were, at the same time, enforcing a no-solicitation rule against their employees. Moreover, in both cases the employers were admittedly guilty of various other unfair labor practices which were unrelated to the discriminatory enforcement issue. The only difference between the two cases was that in one the employer's solicitation and distribution campaign was conducted coercively while it was not in the other.

The Court framed the specific issue before it as follows:

> . . . The very narrow and almost abstract question here derives from the claim that, when the employer himself engages in anti-union solicitation that if engaged in by employees would constitute a violation of the rule—particularly when his solicitation is coercive or accompanied by other unfair labor practices—his enforcement of an otherwise valid no-solicitation rule against the employees is itself an unfair labor practice. We are asked to rule that the coincidence of these circumstances necessarily violates the Act, regardless of the way in which the particular controversy arose or whether the employer's conduct to any considerable degree created an imbalance in the opportunities for organizational communication. . . . (p. 362).

This Court refused to do so, holding that an employer, in the absence of a showing that the union lacked available alternative methods of communicating with the employees, has the absolute right to conduct such a campaign while at the same time enforcing a no-solicitation rule against his employees. To this effect, this Court definitively stated:

> *No attempt was made in either of these cases to make a showing that the no-solicitation rules truly diminished the ability of the labor organizations involved to carry their messages to the employees. Just as that is a vital consideration in determining the validity of a no-solicitation rule, it is highly relevant in determining whether a valid rule has been fairly applied.* Of course, the rules had the

> effect of closing off one channel of communication; but the Taft-Hartley Act does not command that labor organizations as a matter of abstract law, under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers, nor that they are entitled to use a medium of communication simply because the employer is using it. No such mechanical answers will avail for the solution of this non-mechanical, complex problem in labor-management relations. *If, by virtue of the location of the plant and of the facilities and resources available to the union, the opportunities for effectively reaching the employees with a pro-union message, in spite of a no-solicitation rule, are at least as great as the employer's ability to promote the legally authorized expression of his anti-union views, there is no basis for invalidating these "otherwise valid" rules.* . . . (pp. 363-364, emphasis added) (Citations omitted).

Applying this reasoning herein, the record reveals that, unlike in *Steelworkers*, the parties did introduce evidence concerning the accessibility and use of alternate channels of communication. In fact, the evidence, as found by both Respondent and the Court of Appeals, conclusively established: that employees solicited and distributed both pro- and anti-union literature on Company premises during non-working hours; that they also wore shirts, buttons and other insignia indicating pro- or anti-union allegiance; and finally, that the Union itself, solicited and distributed literature on numerous occasions at each of the entrances to Petitioner's facility. Petitioner, therefore, respectfully submits that, in light of this additional affirmative evidence, this

Court should reaffirm the principles enunciated in *Steelworkers* and reverse the Court of Appeals herein.

Factually, the only real difference between this case and *Steelworkers* is that Petitioner used mini-skirted non-bargaining unit employees instead of supervisors to distribute its pro-company literature. This fact, although mentioned in Respondent's decision, was apparently not viewed by Respondent as being in and of itself significant in the disposition of the case. Moreover, Petitioner is unaware of any legal precedent restricting an employer to the use of supervisory personnel in conducting such a campaign. If Respondent by this decision intends to impose such a restriction, then, it should have, as this Court pointed out in *Steelworkers*, analyzed the evidence and set forth the "basis in the actualities of industrial relations, for such a finding." (p. 364).

Similarly, Petitioner would like to call this Court's attention to Respondent's backhanded attempt to justify its decision on the basis that Petitioner failed to allege and prove that the activities of employee Roberts either interfered with her work or that of others. Aside from the fact that Petitioner is unaware of any legal precedent to support the imposition of such a requirement, it would clearly be contrary to this Court's pronouncements in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 89 L. Ed. 1372 (1944). In *Republic*, this Court approved the Respondent's landmark decision in *Peyton Packing Co.*, 49 N.L.R.B, 828 (1943), in which it established the rule that an employer has the right to prohibit the solicitation and distribution of campaign literature by its employees on working time. (pp. 803-804). In fact, this Court approved Respondent's adoption of the presumption that such employer

action was clearly legal in the absence of a showing of discriminatory enforcement. (p. 804). Significantly, neither *Republic* nor *Peyton* directly or impliedly admit to any exception to this right of absolute control over working time, nor is any justification for such an exception given in Respondent's decision herein.

Since it is undisputed that Roberts was distributing literature on working time, Respondent's decision, if not directly, at least by implication must be viewed as establishing the requirement that an employer may not enforce a valid no-solicitation rule against such an employee unless it can also allege and prove work interference. Such a requirement would not only conflict with an employer's right under Section 8(c) of the Act to express and disseminate his views, but would also be inconsistent with the realities of present day labor relations. For example, can there be any doubt that an employer has the unrestricted right to call his employees together on working time to deliver a captive audience speech? *See, e.g., Livingston Shirt Corp.*, 107 N.L.R.B. 400 (1953). What could interfere more with work than such speeches? Yet they are unquestionably proper. Any such requirement based on work interference is, therefore, Petitioner submits, improper and practically unworkable.

Petitioner further respectfully submits that the issues raised by Respondent's decision on this point are extremely important since they involve literally thousands of similarly situated employers each year. At the present time, Respondent conducts approximately 8,000 elections a year.[4] Undoubtedly, a great number of these elections involve campaigns wherein the employer's con-

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[4]Thirty Fourth Annual Report of the NLRB (1969).

duct raises one or more of the problems involved herein. A decision by this Court resolving these questions is needed so that all parties will have known and established guidelines for evaluating what is and what is not proper conduct in an election campaign.

2. The Decision on the Wage Survey Announcement Is Incompatible With This Court's Pronouncements in Exchange Parts and the First Circuit Court's Decision in Gotham Industries.

In *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 11 L. Ed. 2d 435 (1964), this Court established the following criteria for determining whether a violation of Section 8(a)(1) of the Act has occurred:

> . . . We have no doubt that it prohibits not only intrusive threats and promises but also conduct immediately favorable to employees *which is undertaken with the express purpose of impinging upon their freedom of choice for or against unionization and is reasonably calculated to have that effect*. . . . (p. 409) (emphasis added).

In enunciating this doctrine, this Court has made it clear that the employer's "primary" motivation is the pivotal factor. Mere interference with employee organizational rights, standing alone, is insufficient to make out a violation of the Act. Only conduct which is inherently or demonstrably destructive of employee rights or which is specifically motivated by a desire to accomplish such interference is prohibited. *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 268-269, 13 L. Ed. 2d 827 (1965); *NLRB v. Brown*, 380 U.S. 278, 286, 13 L. Ed. 2d 839 (1965). With respect to the latter, it must be affirmatively proven that the employer was primarily induced, prompted or impelled

to act as the result of union activities to constitute a violation of the Act.

In *Exchange Parts*, this Court, in finding such improper motivation, relied on the fact that the promise of benefit was made at a time when the election was pending and in speeches and subsequent literature which inextricably coupled that promise with anti-union statements as well as direct but subtle threats that no union could fulfill such promises (pp. 406-407). In like manner, the Courts of Appeal have required independent evidence of improper motivation or have either inferred same from the coupling of the promise with a context of expressed anti-union hostility or from the lack of justification for the timing and recurrence of the promise in relation to a set election date. *See, e.g., Joy Silk Mills v. NLRB*, 185 F.2d 732 (D.C. Cir.), *cert. denied*, 341 U.S. 914 (1950); *NLRB v. Laars Engnrs., Inc.*, 332 F.2d 664 (9th Cir.), *cert. denied*, 379 U.S. 930 (1964); *Welsh Indus., Inc.*, 385 F.2d 538 (6th Cir. 1967). On the other hand, the opposite result has been reached where the catalyst for the conduct can be traced to past practice or other indicia occurring outside and oftentimes prior to the onset of the union organizational campaign. *See, e.g., NLRB v. Gotham Industries, Inc.*, 406 F.2d 1306 (1st Cir. 1969); *Jervis Corp., Bolivar Div. v. NLRB*, 387 F.2d 107 (6th Cir. 1967); *Robertshaw Controls Co., Acro Div. v. NLRB*, 386 F.2d 377 (4th Cir. 1967).

In a case on almost all fours with the instant once and against this backdrop of legal precedent, the First Circuit in *NLRB v. Gotham Industries, Inc.*, 406 F. 2d 1306 (1st Cir. 1969), refused to find that an employer's promise of benefit given during an election campaign violated the Act. The evidence before the court

essentially established: that Respondent set aside the initial election as a result of finding the employer had committed unfair labor practices and interfered with the employees' rights; that the employer appealed that decision to the circuit court which affirmed Respondent; that shortly thereafter the employer was approached by his employees who demanded a wage increase; that the employer agreed to grant the wage increase a few days before the Regional Director ordered a rerun election; that the employer claimed he had granted the wage increase because of his employees' demand, the tight labor market, and the impending increases to be put into effect in the beginning of the year as a result of changes in the Fair Labor Standards Act; and, finally, that the union filed charges claiming that the promise of the wage increase constituted a violation of Section 8(a)(1) on the ground that it was primarily motivated by a desire to interfere with the rerun election.

Respondent, as a result of the foregoing evidence, found the employer to have violated the Act based on the employer's past history of hostility and the timing of the announcement in relation to the rerun election. The First Circuit, unlike in the instant case, reversed Respondent, finding that the evidence did not establish improper motivation. In so doing, the court in essence reasoned that it was difficult to find improper motivation when the employer made the promise in response to the referred-to considerations which were all beyond his control (p. 1311). In the court's view, these business reasons for the increase justified the employer's deviating from his established past practice of giving wage increases and other benefits at a later time in the year. In short, the court concluded that Respondent had failed

to meet its burden of proof since the evidence established that the catalyst or initial inducement for the wage promise arose from considerations unrelated to union activities.

Petitioner respectfully submits that had the Court of Appeals in the instant case properly applied the *Exchange Parts* doctrine, it would have reached the same result as the First Circuit in *Gotham*. Instead, the Court of Appeals and Respondent chose to disregard the undisputed facts: that had it not been for the impending changes in the Fair Labor Standards Act, Petitioner would never have thought of or mentioned any further wage survey; that given the necessity for such a future wage change, the appropriate time to announce it was during Ashby's yearly speech announcing the results of the annual wage survey along with any other economic data affecting the future of the employees; and finally, that unlike in *Exchange Parts*, the reference to the additional wage survey occurred before an election date had even been set and in the context of a speech which failed impliedly or directly to mention the Union or any activities relating thereto. The Court of Appeals apparently chose to do so because it allowed its judgment to be colored by what it improperly, as will be fully demonstrated *infra*, viewed as Petitioner's past history of "interference with the rights of employees."

Certainly, Petitioner had a lawful right to conduct such a wage survey and to grant increases as the result of the imposition of the new minimum wage provisions of the Fair Labor Standards Act. *See, e.g., 20th Century Glove Co.*, 165 N.L.R.B. No. 122 (1967); *Crown Laundry & Dry Cleaners, Inc.*, 160 N.L.R.B. 746 (1966). Why, then, if Petitioner had such

a legal right, could it not announce that fact to its employees? Petitioner is unaware of any legal precedent which prevents an employer from announcing or stating what he has a legal right to do. In fact, this court's decision in *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 269, 13 L. Ed. 2d 827 (1965), wherein the Court stated: "A violation of Section 8(a)(1) alone therefore presupposes an act which is unlawful even absent a discriminatory motive" seems to indicate that an employer has such a right.

Along these same lines, this Court in footnote 20 of the *Darlington* decision further stated: "Nothing we have said in this opinion would justify an employer's interfering with employee organizational activities by threatening to close his plant, *as distinguished from announcing a decision to close already reached by the Board of Directors, or other management in authority empowered to make such a decision.* We recognize that this safeguard does not wholly remove the possibility that our holding may result in some deterrent effect on organizational activities independent of that arising from the closing itself. . . ." (p. 274) (emphasis added). This reasoning seems particularly appropriate to the instant proceeding since not only was the taking of the survey legally justified, but it was previously authorized by Petitioner's wage committee, which for all intent and purposes acted much like the "Board of Directors or the management in authority" referred to by this Court in the above-quoted material. As a result of all of these circumstances, Petitioner respectfully submits the instant decision is in conflict with the *Exchange Parts* doctrine established by this Court as well as the First Circuit Court's decision in *Gotham*, and that certiorari should be granted to rectify this situation.

3. The Court of Appeals Failed to Accord Petitioner Due Process of Law by Fairly and Objectively Discharging Its Responsibilities Under This Court's Decision in Universal Camera, but Instead Chose To Improperly Bottom Its Decision on a Nonexistent Past History of Petitioner Interference With Employee Rights.

It is a reviewing court's obligation under this Court's decision in *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 95 L. Ed. 456 (1950), to objectively and fairly scrutinize decisions by Respondent to determine whether there is, in fact, substantial evidence in the record to support Respondent's findings. Petitioner contends, as previously noted, that the Court of Appeals failed to discharge this responsibility because it apparently placed primary significance on Petitioner's alleged past history of interference with employee rights in evaluating the pivotal element of Petitioner's motivation. Thus, the Court of Appeals in the opening paragraph of its decision, states that: "*This case arises with a background of prior activities by the Company in interfering with the rights of employees.* On June 8, 1967, the Board conducted a representation election among production and maintenance employees . . . of the Company. . . . The Union filed objections to conduct affecting the results of that election, and *the Board set the election aside* and ordered a new election to be held." (emphasis added). Similarly, the Court of Appeals again cites these facts as primarily important in determining that Ashby's announcement of an additional wage survey was discriminatorily motivated. In this respect the Court of Appeals states: "The record indicates that there was a background of employer interference with the rights of employees. The first election on June 8, 1967, had been set aside and a new election, held even-

tually on December 15, 1967, was ordered by the Regional Director."

Based on the foregoing statements, the Court of Appeals apparently concluded that Petitioner had been found guilty of various kinds of illegal conduct in prior proceedings, and as a result thereof that the first election was set aside. The record, however, is devoid of any such evidence other than a reference by the General Counsel to the prior proceedings with the admission that those proceedings were not adjudicated but instead resolved by stipulation to set the election aside and a settlement agreement containing a specific clause disclaiming any violation of the Act. In fact, the Trial Examiner at that time stated to the General Counsel that his references could not be used as evidential matter since there had been no adjudication and the settlement agreement specifically contained the referred-to clause. Such agreements are commonly used to resolve charges and objections where for many different reasons the parties decide that they do not wish to litigate the controversy. In all of these instances, the employer enters into the agreement relying on the representation by General Counsel, as set forth in the agreement, that the execution thereof does not constitute an admission of guilt or violation of the Act.

The Court of Appeals assumed that there had been an adjudication and that Petitioner had, in fact, been found guilty of unfair labor practices and interference with employee rights. In view of this assumption and the court's repeated reference to it, it is apparent that the court viewed Petitioner's evidence in the record with less than a totally objective eye. Aside from the fact that the assumption is factually inaccurate, the use of that assumption for evidentiary purposes is contrary to

established legal precedent. This Court and the Ninth Circuit, itself, have made it clear that evidence of events occurring outside the Act's Section 10(b) statute of limitations can only be used to shed light on events occurring within the appropriate period and not as evidence that a violation has occurred within the period. *See, e.g., Local Lodge 1424 v. NLRB*, 362 U.S. 411, 4 L. Ed. 2d 832 (1960); *NLRB v. MacMillan Ring-Free Oil Co.*, 394 F.2d 26, 31-32 (9th Cir. 1968).

Here, however, there was not even any evidence introduced, other than a reference to the settlement agreement, to establish, for any purpose, what conduct Petitioner had in fact participated in. Petitioner, therefore, contends that the Court of Appeals has by said action deprived Petitioner of a fair hearing in violation of the due process clause of the Fifth Amendment of the United States Constitution.

Moreover, Petitioner submits that the Court of Appeals would in all probability have reached a different decision had it not been so improperly influenced by the referred-to assumption. In this connection, the two violations of the Act involving employee Jones are but exemplary of the Court's failure to objectively and carefully scrutinize the record as the result of said assumption. Thus, the Court of Appeals chose to brush off, with the remark that issues of credibility were for Respondent to decide, Petitioner's contention that Jones's testimony, even if fully credited, did not establish by a preponderance of the evidence that Barrie made any remarks to him in violation of the Act. Had the Court of Appeals objectively reviewed Jones's testimony on both direct and cross-examination, Petitioner submits, it would have concluded that his testimony could in no event, constitute substantial evidence to support a vio-

lation of Section 8(a)(1) of the Act. This was not a case of conflict in testimony where the trier of the facts had an election to choose between contradictory statements. The General Counsel presented only one witness on this issue and that witness, Jones, did not present evidence in support of the General Counsel's case.

Similarly, the Court of Appeals, like Respondent, chose to disregard Petitioner's economic justification for the denial of overtime to Jones on the basis that no metal cases of the particular type needed to provide such work for Jones were available on the evening overtime was refused. *NLRB v. Great Dane Trailers*, 388 U.S. 26, 18 L. Ed. 2d 1027 (1967); *American Ship Building Co. v. NLRB*, 380 U.S. 300, 13 L. Ed. 2d 855 (1965). Yet, it is undisputed in the record that the Trial Examiner's decision was solely based on the availability. In this connection, the Trial Examiner mistakenly assumed first that all fishing rods which Jones worked on had to be packaged, and secondly that they had to be packaged in aluminum cases. Barrie's testimony established without contradiction that this was completely untrue.

Instead, the Court of Appeals was content, with its inaccurate assumption as background evidence, to point to two statements made by Barrie to Jones concerning his wearing of a pro-union shirt. Neither of these statements was cited as evidence of anti-union motivation for the denial of overtime by Respondent or the Trial Examiner, and rightly so, since they were not accompanied by threats of force, reprisal or a promise of benefit and as such were absolutely privileged under Section 8(c) of the Act. The Court of Appeals' use of these statements as evidence of discrimination was therefore in violation of the provisions of the Act,

and other circuit courts have so uniformly held. *See, e.g., NLRB v. Arkansas Grain Corp.*, 392 F.2d 161, 165 (8th Cir. 1968); *NLRB v. Colvert Dairy Products Co.*, 317 F.2d 44, 46-47 (10th Cir. 1963).

As the Sixth Circuit stated in *NLRB v. Cleveland Trust Co.*, 215 F.2d 95, 98 (6th Cir. 1954), ". . . The Board is not authorized to ignore material uncontradicted facts. It is required under Section 7(c) of the Administrative Procedure Act, 5 U.S.C.A. § 1006(c) to impose sanction or rule or order or issue any rule or order 'except upon consideration of the whole record * * * and as supported by and in accordance with the reliable, probative and substantial evidence.'" *Accord, Universal Camera Corp. v. NLRB*, 340 U.S. 474, 95 L. Ed. 456 (1950); *NLRB v. Cranston Print Works Co.*, 258 F.2d 206 (4th Cir. 1958); *Glaziers' Local No. 558 v. NLRB*, 408 F.2d 197, 201 (D.C. Cir. 1969). The Court of Appeals has failed to do so and Petitioner has been deprived of a fair hearing as a result thereof. This Court should grant this writ not only to remedy this situation but more importantly, to establish guidelines for the evidentiary use of these frequently used settlement agreements.

Conclusion.

To resolve important questions in the continuing administration of the National Labor Relations Act raised by the Court of Appeals' decision concerning the no-solicitation rule and the reference to the wage survey, to insure the vitality of the *Steelworkers* and

Exchange Parts decisions, to eliminate a conflict with the decision of the First Circuit Court of Appeals in *Gotham*, and to insure that the courts of appeals will objectively and fairly discharge their reviewing responsibilities under *Universal Camera*, Petitioner respectfully prays that this Court grant this Writ of Certiorari.

Dated: October 26, 1970.

Respectfully submitted,

JAMES H. KINDEL, JR.,
ROY E. POTTS,
VICTOR F. YACULLO,
By JAMES H. KINDEL, JR.,
Attorneys for Petitioner.

APPENDIX "A."

Statutes Involved in This Proceeding.

1. National Labor Relations Act, Sections 8(a)(1) and (3), as amended, 61 Stat. 140 (1947), 29 U.S.C. §§ 158(a)(1) and (3) (1958 ed.) provide in pertinent part:

> "(a) It shall be an unfair labor practice for an employer—
>
> "(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [Section 157 of this Title];
>
> * * * *
>
> "(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ."

2. National Labor Relations Act, Section 7, as amended, 61 Stat. 140 (1947), 29 U.S.C. § 157 (1958 ed.), provides:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a) (3) of this title]."

3. National Labor Relations Act, Section 8(c), as amended, 61 Stat. 140 (1947), 29 U.S.C. § 158(c) (1958 ed.), provides:

"(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

4. National Lavor Relations Act, Section 10(b), as amended, 61 Stat. 140 (1947), 29 U.S.C. § 160(b) (1958 ed.), provides in pertinent part:

"(b) . . . provided that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such a charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. . . ."

APPENDIX "B."

Opinion of the Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

The Conolon Corporation, *Petitioner*, vs. The National Labor Relations Board, *Respondent*. No. 24,796.

[August 4, 1970].

On Petition to Review and Set Aside, and on Cross-Application, to Enforce an Order of the National Labor Relations Board.

Before: CHAMBERS and CARTER, Circuit Judges, and BYRNE, District Judge.*

CARTER, Circuit Judge.

This matter arises on application of the Conolon Corporation, hereafter the Company, to set aside the Board's order and a cross-application of the Board to enforce the order. The case arises with a background of prior activities by the Company in interfering with the rights of employees. On June 8, 1967, the Board conducted a representation election among production and maintenance employees at the plant of the Company in Santa Ana, California. The Union filed objections to conduct affecting the results of that election, and the Board set the election aside and ordered a new election to be held. A second election was conducted on December 15, 1967 in the same production and maintenance unit, consisting of approximately 318 eligible employees. The conduct and matters hereinafter referred to occurred during the months of November and December 1967.

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*Honorable William M. Byrne, Sr. United States District Judge, Central Division of California, sitting by designation.

The Board fond violations of § 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), as follows: the Company announced a new and further wage survey accompanying the regular and customary announcement of a present wage increase; the Company promised to promote Jones, an employee, if he supported the Company; the Company in a discriminatory manner enforced its nonsolicitation rule; the Company solicited mini-skirted clericals from a non bargaining unit to distribute anti-union literature; and the Company through one of the clericals threatened an employee Trujillo with loss of benefits and promised a wage increase. The Board also found that the Company had denied overtime to Jones because of his union adherence in violation of § 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1). The Board's decision and order is reported at 175 NLRB, No. 9.

1. *The announcement of a new wage survey.*

On November 2, 1967 President Ashby addressed a meeting of employees and stated that a wage survey had been made and that they would receive a wage increase of 10 cents an hour effective October 28, 1967. This statement was not alleged to be an unfair labor practice or an interference with the election. The Company was following a practice of prior years. However, Ashby also stated that another survey would be made some time after the first of the year and if necessary, wage rates would be changed again.

The Company was aware that the federal minimum wage was to be changed on February 1, 1968 and had anticipated that this would occasion a further change in wage rates. Prior to Ashby's talk, the Company considered the possibility of making a further

wage increase that would take into account this change in the federal minimum wage law, due to occur in February 1968. The majority of the Company's wage committee felt that the increase should be made in November along with the increase then being given. However, the President and Vice President of the Company overruled the committee on the ground that any further increase would be a departure from past practice and would make the Company vulnerable to an unfair labor practice charge.

Thus the Company departed from its standard practice when Ashby informed the employees that *another survey* was planned for some time after the first of the year and that wage rates might be changed again. In its brief to the Board, the Company conceded that this wage survey announcement at the November meeting was unprecedented. The examiner found that "although Ashby did not expressly promise that this [the wage survey] would occur, the only accounting for his announcement to them of another survey within a short period of time was to convey to the employees the expectation of a further increase. I find that by this announcement made while the representation election was pending respondent violated § 8(a)(1) of the Act and interfered with the election." Although an express promise was not made, there was the conveyance of the expectation of a future increase. It was an implicit promise although not an express one. At the hearing before the trial examiner, Vice President Barrie testified that he and President Ashby recognized that the granting of a second wage increase at the November meeting would have been "something we had not done in previous years."

The record indicates that there was a background of employer interference with the rights of employees. The first election on June 8, 1967, had been set aside and the new election, held eventually on December 15, 1967, was ordered by the Regional Director. The record shows the Company's manifest hostility by its interference with employees' rights as set forth elsewhere herein.

In addition, the Company failed to explain its action in announcing the new wage survey on the basis of legitimate business conditions, and the Board could reasonably conclude, as it did, that the Company was prompted by an unlawful purpose. It is clear that the Board so found since it approved the examiner's findings and conclusions that the announcement of the wage survey, while an election was pending, violated § 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1) and interfered with the election.

A wage increase shortly before an election, although ordinariy made annually earlier in the year, has been held to be an interference with the election and an unfair labor practice. *N.L.R.B. v. Welsh Industries, Inc.*, (6 Cir. 1967) 385 F.2d 538, 540-541.

It is a proper inference that the announcement was to emphasize to the employees that they had "no need for a collective bargaining agent," see *N.L.R.B. v. Bailey*, (6 Cir. 1950) 180 F.2d 278, 279, and suggested to the employees "that the sources of benefits now offered is also the source from which future benefits must flow and which may dry up if not obliged." *N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964).

The Company contends that the statement by President Ashby was an expression of views under § 8(c) of the Act, 29 U.S.C. § 158(c). The Board, in substance, determined that President Ashby's announcement of a new wage survey was a promise of a benefit designed to interfere with the employees' rights. As such it is not protected under § 8(c) of the Act, 29 U.S.C. § 158 (c).

In any event, the question was for the Board to decide. "The determination of the category into which the remarks fell was a question of fact for the Board, *National Labor Relations Board v. Virginia Power and Electric Co., supra,* (314 U.S. 469) and the Board's finding on the fact may not be disturbed," *Elastic Stop Nut Corp., v. N.L.R.B.,* (8 Cir. 1944) 142 F.2d 371, 378. See, *N.L.R.B. v. Eastern Die Co.,* (1 Cir. 1965) 340 F.2d 607, cert. den. 381 U.S. 951.

2. *The Company's promise to promote Jones if he supports the Company.*

In November of 1967 Jones, one of the employees, talked to Vice President Barrie about his progress with the Company since his return from military service. Barrie assured him that if he did a good job and learned the business there was a future for him with the Company. Jones told Barrie that he had attended Union meetings to hear both sides of the story; that he had no feelings one way or the other; and that he liked the Company and was simply looking for information before he cast his ballot. Jones testified that Barrie then said that he knew that Jones had a significant influence among the employees and (1) asked Jones to use his influence to persuade other employees against the Union and (2) told him that if he were for the Company he would be "able to move up in position."

The examiner discredited Jones's statement as to using his influence to persuade other employees against the Union but found that Barrie had made the second part of the statement as shown above. The Board adopted the examiner's findings without comment or modfication. The Company argues credibility. This was a problem for the examiner. Barrie's statement clearly conveyed a promise of benefit to Jones in return for Jones's repudiation of the Union.

"[I]nterference is no less interference because it is accomplished through allurements rather than coercion . . .", *Western Cartridge Co. v. N.L.R.B.*, (7 Cir. 1943) 134 F.2d 240, 244; cert. den. 320 U.S. 746; *N.L.R.B. v. West Coast Casket Co.*, (9 Cir. 1953) 205 F.2d 902, 905. ". . . [P]romises of benefits from voting against the Union are prohibited," *N.L.R.B. v. Luisi Truck Lines*, (9 Cir. 1967) 384 F.2d 842, 845.

The Company relies on *Salinas Valley Broadcasting Corp., v. N.L.R.B.*, (9 Cir. 1964) 334 F.2d 604-14. The case is not controlling. The factual situation therein was different from the case at hand.

3. *Denial of overtime to employee Jones.*

Jones, on December 14, 1967, the day before the election, put on a white shirt with the words "Vote Yes" on the back, which another employee had brought to the plant. Shortly thereafter Vice President Barrie spoke to Jones and said, "I see you picked your side." Later the same day, one of the supervisors approached Jones and told him there was no overtime work for him that day because no fishing rods were being shipped from the specialty shop. Jones told the supervisor that, in effect, he was being sent home and denied overtime because he was wearing a union shirt.

Jones talked to Vice President Barrie. Barrie then contended there was a shortage of materials with which to construct the metal cases in which special fishing rods were packaged. During the conversation, Barrie said to Jones "that he would like to see him take that shirt off."

The Company's defense was there was a shortage of material needed to construct the metal packaging for the rods. Testimony was offered that the Company received the last shipment of packaging material on June 23, 1967, and the next shipment.did not arrive until January 23, 1968. However, Jones worked overtime on December 13, the day before the incident in question, and worked overtime on December 15 and the four succeeding work days. The examiner rejected the contention that Jones was denied overtime because of a shortage of materials and found that he was denied overtime in a discriminatory manner on December 14. The Board approved the examiner's finding without change or comment.

The Act is violated when the employer withholds overtime from an employee because of the employee's union activity. *N.L.R.B. v. Buddy Schoellkopf Products, Inc.*, (5 Cir. 1969) 410 F.2d 82, 87; *N.L.R.B. v. Unified Industries Inc.*, (6 Cir. 1960) 273 F.2d 431, 432. The timing of the supervisor's announcement that Jones would not get overtime work on December 14, and the Company's animus as shown by its unlawful efforts to persuade Jones to reject the Union, amply support the Board's holding that the denial of overtime work to Jones was unlawfully motivated. See, *N.L.R.B. v. Tonkin Corporation of California,* (9 Cir. 1965) 352 F.2d 509, 511.

4. *Discriminatory enforcement of the non-solicitation rule.*

The Company by rule, prohibited solicitation in working areas during working hours, but wearing of insignia indicating an employee's allegiance was not prohibited.

A Miss Roberts passed out union literature on December 13, 1967 as she waited to punch out. On December 14, she was ordered to report to the office and reprimanded by President Ashby for violating Company rules. A note of the incident was placed in her file. On December 15, 1967, Whiting, an employee, passed out union literature near the time clock. He was ordered by President Ashby of the company to "get out of here and don't come back with that paper." The examiner found no discriminatory enforcement of the no-solicitation rule.

The Board found discrimination. No question of credibility was involved. The Board pointed out the facts, referred to hereinafter in Sec. 5, that on December 15 the Company had a number of clerical employees in mini-skirts and boots distributing anti-union literature as the morning shift was punching in.

The Company argues that the mini-skirted employees were not agents of the Company and were in a non-bargaining unit. Vice President Barrie testified they were not paid for their time in passing out literature and were told they would be volunteering their time. Further the Company contends that another employee, Jeffers, had been earlier reprimanded for passing out union literature. However, Jeffers received no written reprimand, only an instruction against repetition of the offense.

The Board's conclusion that the Company "enforced its non-solicitation (rule) in a disparate and discriminating manner to punish Roberts for her support of the Union and to deter her from such activities in the future in violation of § 8(a)(1) of the Act" is not clearly wrong.

An employer violates § 8(a)(1), 29 U.S.C. § 158 (a)(1) if it enforces a non-solicitation rule in a discriminatory manner, *Revere Camera Co. v. N.L.R.B.*, (7 Cir. 1962) 304 F.2d 162, 165; See *William L. Bonnell Co. Inc., v. N.L.R.B.*, (5 Cir. 1969) 405 F.2d 593, 595.

5. *Distribution of literature by the mini-skirted clericals.*

The Union had passed out a card to the effect that James Drury, the actor famous in the "Virginian," belonged to a union. The Union had used the terms "mini-skirts," "mini-checks" and "high boots" in its campaign. The Company after checking with Drury, arranged to pass out pictures of Drury with a reference to him in connection therewith. Four or five clerical employees in a non-bargaining unit volunteered to pass out the pictures. They wore mini-skirts and high boots. Some of the boots were supplied by the company. The girl clericals wore signs "Yes on minis—No on Union." They passed out pictures of James Drury, on the back of which was the phrase "Vote No." A picture of Drury was stapled to the card or sign that each girl was wearing and across their backs were the words, "The Virginian says Vote No."

The examiner found that the conduct interfered with the election and was a violation of § 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1). The Board accepted the

findings of the examiner and also commented in its order on the matter.

We consider the alleged violation a tempest in a teapot. Employer solicitation or interrogation standing alone is ordinarily not sufficient to support a violation of the Act. Ordinarily the solicitation or interrogation must be accompanied by threats of reprisal, force or by promises of benefit. Nowhere in the decision of the Board or the trial examiner is there any direct or implied finding that the activities of the mini-skirted clericals in passing out literature was accompanied by any threat of reprisal, force or any promise of benefit, with the exception of the remarks of Miss Fakler, discussed hereafter. Nor can such a finding be supported by the record. The record is devoid of threat, coercion or promises on the part of the mini-skirted clericals in passing out the anti-union literature, with the exception of the remarks of Fakler.

We decline to enforce this portion of the Board's order.

6. *The alleged threats and promises to Trujillo.*

The examiner found that Trujillo, an employee, after he had already voted, had a conversation with Miss Fakler, one of the mini-skirted clericals. She stated to him that if the union won the election it would take away all the benefits the Company had provided, and that if he wanted a raise all he had to do was talk to President Ashby and he would get the raise. It appears that the conversation was instigated by the union representative, Pat Daniels, who asked Fakler why she did not want the Union. The examiner found that Fakler had no expressed or implied authority to assure anyone a wage increase or withdrawal of benefits and

that she was representing her personal views which had been solicited by the union representative. The examiner found that the Company had not committed an unfair labor practice that interfered with the election.

The Board overruled the examiner and found otherwise. In the factual situation presented we agree with the examiner. This part of the Board's order will not be enforced.

Enforcement of the order of the Board is granted with the exception of the portions of the order discussed in No. 5 and 6, supra, and as to those portions of the order, enforcement is denied.

APPENDIX "C."

Decision and Order.

United States of America, Before the National Labor Relations Board.

The Conolon Corporation and Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO. Cases 21-CA-7939, 21-RC-10431.

On October 16, 1968, Trial Examiner James R. Webster issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner further found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint, and recommended that those allegations be dismissed. Thereafter, the Respondent and the General Counsel filed exceptions and cross-exceptions, respectively, and briefs in support thereof. The Respondent filed an answering brief to the General Counsel's cross-exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relation Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings,

conclusions, and recommendations of the Trial Examiner except as herein modified.

1. We agree with the Trial Examiner that by soliciting non-bargaining unit office clericals to distribute anti-union literature to bargaining unit employees, Respondent interfered with the clericals' rights guaranteed by Section 7 of the Act and thereby violated Section 8 (a)(1). We perceive no substantive difference in the instant situation from those cases which have held that solicitation of employees to influence other employee's views on union activity by an employer or its agents which necessarily places the solicited employee in a position where he must reveal his views as to union activity is coercive and violative of Section 8(a)(1).[1] Here, Respondent in response to Union propaganda containing references to "mini paychecks", "miniskirts" and "hi-boots", conceived the idea of distributing anti-union literature by girls dressed in mini-skirts and hi-boots. Volunteers for the distribution were solicited by the secretary to the president and vice-president from amongst the office clericals. Four or five clericals agreed to participate. Some received free pairs of boots to wear and keep. The record shows that all the participants agreed to distribute the literature and were not instructed in any manner as to the expression of their own opinions during the distribution. However, because of Respondent's control over the tenure and working conditions of the employees involved, its solicitation of the office clerical's participation in its antiunion campaign under the conditions described above placed the

[1] *Garland Knitting Mills*, 170 NLRB No. 39 at p. 3; *Kawneer Company*, 164 NLRB No. 138, TXD at p. 19; *Beiser Aviation Corp.*, 135 NLRB 399, 400; *The Charles V. Weise Co.*, 133 NLRB 765, 766.

employees in the position of declaring themselves as to union preference just as if they had been interrogated as to such preference,[2] and thereby interfered with their exercise of rights guaranteed by Section 7 of the Act. The fact that the employees solicited were not involved in the election is immaterial. Employees within the meaning of Section 2(3) do not lose the protection of the Act merely because they are not part of the bargaining unit being organized. We also agree with the Trial Examiner that, by soliciting and utilizing the clericals in order to influence unit employees to vote against the Union, Respondent interfered with the election.

We do not agree with the Trial Examiner, however, that the Respondent was not responsible for the conduct of Marilyn Fakler while she was distributing its literature. Employee Trujillo testified that during the course of the distribution Fakler stated to him that if the Union were to win the election, it would take away all the benefits the Company had provided. She also stated that if he wanted a raise, all he had to do was go to Company President Ashby who would give him a dime increase. This testimony was corroborated by Union Representative West and was credited by the Trial Examiner. Respondent contends that the only instructions given the girls regarding the handouts were as to when and where to pass them out and that any antiunion remarks made were expressions of personal views and therefore beyond the scope of their authority. We find this argument without merit. Respondent made Fakler its agent by supplying her

[2]Indeed, the offer to provide some of the clericals with boots put those employees in the most awkward position since to refuse to participate under those circumstances would appear to be the clearest indication of prounion sentiment.

with antiunion literature, dressing her in a distinctive costume, and sending her to distribute Respondent's literature which was designed to influence the employees to vote against the Union. The fact that it may not have authorized her to make the remarks she made is immaterial as she was acting within the apparent scope of her authority, no limitations as to such authority were communicated to the employees, and she performed in a manner such as to lead employees reasonably to believe that she was speaking for and on behalf of the Respondent.[3] We find, therefore, that Fakler's statements to Trujillo are attributable to the Respondent and that, in the circumstances, they interfered with, restrained, and coerced employees in the exercise of Section 7 rights in violation of Section 8(a)(1) of the Act, and that they, along with other conduct of Respondent found herein to be violations of Section 8(a)(1), improperly interfered with the election.[4]

2. The Trial Examiner found that Respondent's reprimand of employee Mitsuko Roberts on December 14 was a proper enforcement of its no-solicitation rule

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[3]*Department Store Food Corp. of Penna.*, 172 NLRB No. 129, TXD at p. 11; *Valley Forge Flag Company*, 152 NLRB 1550, 1554.

[4]Member Zagoria agrees, for the reasons set forth in the decision, that the Respondent violated Section 8(a)(1) of the Act by its solicitation of clerical employees. He would not find that this conduct interfered with the election in the production and maintenance unit, however, nor would he find the "utilization" of these employees to be 8(a)(1) or election interference. Moreover, he agrees with the Trial Examiner that the remarks of Fakler, one of the clericals, were not attributable to the Respondent since she had no express or implied authority to promise wage increases or threaten withdrawal of benefits. Member Zagoria believes that Fakler's remarks were, and appeared to be, merely expressions of her personal opinion. Accordingly, he would find that Fakler's conduct did not violate the Act or interfere with the election.

since Roberts had distributed prounion literature on company time in a working area. We do not agree. On December 13 President Ashby delivered a speech opposing the Union which lasted from 3:15 to 3:25 p.m. Night shift employees, who did not normally commence work until 3:45 p.m., were permitted to punch in prior to the meeting, but day shift employees, whose normal quitting time was 3:30 p.m., had not punched out by the time the speech commenced. Following the speech, Roberts passed out union literature as she waited in line to punch out at the time clock. A supervisor observed the distribution and reported it to Company officials. The next day Roberts was summoned to Ashby's office where he reprimanded her for distributing union literature prior to quitting time, warned her not to do it again, and placed a memorandum of the incident in a Company file.

Respondent makes no contention that Roberts was interfering with either her own or other employees' work, and, indeed, admits that the time clock is not within the plant working area. Moreover, the record shows that on December 15 Respondent had a number of office clericals dress in distinctive costumes and distribute Respondent's antiunion literature near the time clock as the morning shift was punching in.

On the basis of the foregoing we conclude that Respondent enforced its no-solicitation in a disparate and discriminating manner to punish Roberts for her support of the Union and to deter her from such activities in the future, in violation of Section 8(a)(1) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, as modified below, and hereby orders that the Respondent, The Conolon Corporation, Santa Ana, California, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as herein modified:

1. Insert the following new subparagraphs (e) and (f) in paragraph 1 of the Trial Examiner's Recommended Order, and reletter present subparagraphs (e) as (g):

(e) Soliciting and utilizing employees to threaten other employees with loss of benefits if the Union should win the election, and to promise benefits to persuade them not to vote for the Union.

(f) Disparately and discriminatorily enforcing its no-solicitation rule in order to deter union activity.

2. The Notice is modified by inserting the following between the fifth and sixth indented paragraphs:

> WE WILL NOT solicit or utilize employees to convey threats of loss of benefits or promises of benefit while a representation election is pending.
>
> WE WILL NOT disparately or discriminatorily enforce our no-solicitation rule in order to deter union activity.

Dated, Washington, D.C. Mar. 24, 1969.

John H. Fanning, Member
Howard Jenkins, Jr., Member
Sam Zagoria, Member
NATIONAL LABOR RELATIONS BOARD

[Seal]

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

The Conolon Corporation and Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO. Cases Nos. 21-CA-7939, 21-RC-10431.

William J. Pannier, III, Esq.,
of Los Angeles, Calif., for
the General Counsel.

Roy E. Potts, of Kindel &
Anderson, of Los Angeles,
Calif., for the Respondent.

TRIAL EXAMINER'S DECISION

Statement of the Case

JAMES R. WEBSTER, Trial Examiner: This case, with all parties represented, was heard in Santa Ana, California, on July 30 and 31, 1968, upon a complaint of the General Counsel and answer of The Conolon Corporation, herein called Respondent or Employer, and on an order consolidating cases issued by the Regional Director for Region 21 of the National Labor Relations Board. The complaint was issued on April 2, 1968, on a charge filed on February 7, 1968. The complaint alleges that Respondent discriminatorily denied overtime work to employees and threatened, restrained and coerced employees by a disparate enforcement of a no-solicitation rule, by changes in its bonus program, by promises of increased benefits, by causing employees to distribute antiunion literature, and by

other promises and threats, thereby violating Section 8(a)(1) and (3) of the National Labor Relations Act, herein called the Act. The order consolidating cases was issued on April 15, 1968, and directed hearing on Petitioner's Objections Nos. 2, 3, 4, 8, 9, 12 and 13. A substantial portion of the conduct objected to is also alleged in the complaint to be unfair labor practices.

Briefs have been filed by the General Counsel and the Respondent and have been carefully considered. Upon the entire record and my observation of the witnesses, I hereby make the following:

Findings of Fact

I. The Business of Respondent

Respondent is a California corporation with place of business in Santa Ana, California, and is engaged in the business of manufacturing fishing rods. Respondent annually manufactures, sells, and causes to be shipped directly to customers located outside the State of California products valued in excess of $50,000.

Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, herein called the Union or the Petitioner, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices and Objections to the Election

A. *Introductory Statement and Issues*

Pursuant to an order of the Board issued on September 20, 1967, a second representation election was

conducted on December 15, 1967, in a unit of employees of Respondent consisting of approximately 318 eligible voters. The conduct alleged to be unfair labor practices and that complained of in the Petitioner's objections to the conduct of the election occurred during the months of November and December 1967.

The issues are:

1. Whether on December 14, 1967, Respondent denied overtime work to employee Laurence T. Jones because he was wearing a union insignia or because there was a shortage of material.

2. Whether on December 14, 1967, employee Joe Whitney was not permitted to make up time lost as a result of his absence, and if so, whether the reason permission was not granted was because Whitney had worn a union insignia or because no work station was available.

3. On December 13 or 14, 1967, did Respondent enforce a no-solicitaiton rule in a discriminatory manner.

4. Did Respondent illegally interfere with union activities of employees by promising an employee a promotion, by promising employees that it would conduct a wage survey and make further wage increases, and by making changes in its production bonus program.

5. On December 15, 1967, the day of the representation election, did Respondent illegally solicit and utilize office employees to distribute antiunion literature?

6. Did Respondent on December 15, 1967, through an office employee, promise a wage increase and threaten employees with loss of benefits in the event the Union won the election?

B. *Distribution of Antiunion Literature by Office Employees on December 15, 1967*

During the election campaign, the Union distributed literature containing references to "mini paychecks," "mini skirts" and "hi boots." In response to this theme, Respondent conceived of the idea of distributing anti-union literature by girls dressed in mini skirts and high boots. The task of finding volunteers for this distribution was given to Mary Clyde, secretary to President Howard Ashby and Vice President Robert Barrie. Four or five of the office clericals volunteered. The office clericals are not in the bargaining unit involved herein.

The election was scheduled for 2 p.m. to 5 p.m. on December 15, 1967. The first shift starts at 7 a.m. and terminates at 3:30 p.m.; the second shift starts at 3:45 p.m. The clericals distributed literature at the beginning of the first shift, during the lunch period from 11:30 a.m. to 12:30 p.m., and again at the beginning of the second shift.

Before the first shift, the girls distributed literature in the vicinity of Respondent's timeclock and at the service entrances. The mini skirts were furnished by the girls and Respondent purchased boots. The girls wore signs which stated, "Yes on mini, no on union"; "be sharp, vote no"; and "look sharp, vote no." During the lunch hour, they passed out pictures of James Drury, the star in the television program, *The Virginian*. On the back of the picture was the phrase, "Vote no." Also, a picture of James Drury was stapled to the card or sign that each girl was wearing and across their backs were the words, "The Virginian says vote no." As they made these distributions at

noon in the cafeteria area, they were instructed to say "Would you like a picture of James Drury. The Virginia says to vote no."

The references in Respondent's literature to James Drury was prompted by a card distributed earlier by the Union to the effect that Drury had made a statement that he belongs to a union. Before Respondent passed out pictures of Drury, it checked with him on the matter and regarding a reference to him in its literature.

At approximately 3 p.m., the girls went to the two entrance gates to distribute literature to employees reporting for the second shift. They also distributed pictures of James Drury with the same statement to employees that they had made during the noon recess.

Union Representative Charles West with three other union representatives also distributed literature at plant entrances at intervals during the day of the election.

The Board has held that the act of soliciting employees to influence other employees against a union or for a union constitutes an interference with their rights guaranteed by Section 7 of the Act and a violation of Section 8(a)(1) of the Act.[1] In the instant case Respondent sought and obtained volunteers and from among employees not involved in the pending election; yet I cannot find that these two factors warrant a departure from the general rule. Although the volunteers were not directed to influence other employees verbally, they were directed to do so by the wearing of antiunion signs and by the distribution of antiunion literature. I find that by the soliciting and utilizing of employees to influence other employees against the Union, Respond-

[1] *Decision, Inc.*, 166 NLRB No. 41, 65 LRRM 1660.

ent has violated Section 8(a)(1) of the Act and has improperly interfered with the election, although the employees solicited and utilized were outside the bargaining unit.

C. *Alleged Coercive Statements by an Office Employee*

Employee Albert Trujillo, Jr., got off work on the first shift at 3:30 p.m. on December 15. He had voted in the election at about 2 p.m. After getting off work, he went to the gate and conversed with the girls handing out literature there on behalf of Respondent and with the union representatives who were there handing out literature on behalf of the Union. He was there from approximately 3:30 to 4 p.m. While there, Union Representative Pat Daniels asked clerical Marilyn Fakler why she did not want a union and if she thought the employees were making enough money. Fakler replied that if the Union got in, it would take away all the Company's benefits and would spoil the relationship between the Company and the employees and that the Union does not care about anyone except itself. From remarks made during the discussion, she formed the impression that Trujillo thought the only way he could get a higher wage was through the Union. She told him that if he wanted a raise, all he had to do was to go into Mr. Ashby's office and he would give him a dime raise anytime.

The only instructions the clericals received regarding the handouts were as to when and where to pass out literature given them, and in connection with the picture of Drury they were told to ask employees if they would like a picture of James Drury and to tell them that the Virginian says to vote no.

Although these girls were passing out literature at the request of and on behalf of Respondent, they were still

employees of Respondent and free to express their personal views for or against the Union. Marilyn Fahler had no express or implied authority to assure anyone of a wage increase or of a withdrawal of benefits; she was doing no more than expressing her opinion, which had been solicited by Union Representative Daniels. I find that her remarks are not attributable to Respondent and that Respondent has committed no unfair labor practice or interfered with the election thereby.[8]

D. *The Denial of Overtime to Jones and Denial of Makeup Time to Whitney*

Laurence Jones was employed by Respondent as a specialty man handling custom-built and quality fishing rods. In November 1967, Jones went into the office of Vice President Barrie to complain about his wages and progress with Respondent following his return to his job in the summer of 1967, after a tour of military service. Barrie told him that progress was being made and that jobs were opening up and that if Jones put his nose to the grindstone and did a good job and if he would also attempt to learn the business by reading magazines relating to the industry, he had a future with Respondent. Jones also told him that he had attended union meetings because he was interested in hearing both sides of the story and that at the time he had no feelings one way or the other; that he liked the Company and the people he worked with and was looking for information before he cast his ballot. Barrie told Jones that Jones had influence among the employees and that if he were for the Company, he would move up in position.[9]

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[8]There is some conflict in testimony as to instructions given the girls and as to Fahler's remarks to Trujillo. The testimony, as found above, impressed me as the most plausible.

[9]I do not find that Barrie asked Jones to use his influence to persuade other employees against the Union.

On December 14, 1967, the day before the election, one of the employees brought some white shirts to the plant with the words "Vote yes" on the back of each. At about 2 p.m., Jones put on one of the shirts. Employees Danny Goroupe and Joe Whitney also wore these shirts that day. This attracted the attention of other employees and supervisors. Barrie came to Jones and said, "I see you've made up your mind." Jones replied that he had no other choice at that time. Shortly after that, Supervisor Handler came to Jones and told him that he was to leave that day at 3:30 p.m.; that there was no overtime for him because no rods were being sent out from the specialty department. Jones replied that he had worked for Respondent for a long time and knew what was going out and that he was being sent home because he was wearing the union shirt. Jones became very upset and near the end of the work shift, he asked for and received permission to talk with Vice President Barrie. Barrie calmed him down and stated to Jones that he had the wrong idea and that he was being sent home because of production; that there was a shortage of materials with which to construct the metal cases in which the specialty rods were packaged; that there was no point in producing the rods if they could not be packaged and shipped. He also told Jones he would like to see him take the shirt off.

Regarding the cases in which the specialty rods are packaged, Barrie testified that the last order for the material used for these cases was received on June 23, 1967, and that the next receipt of a shipment was on January 23, 1968. Yet, Jones worked overtime on Friday, December 15, and on each day of the following week except Friday, December 22; in fact, Jones con-

sistently worked overtime. Thus, I cannot accept Respondent's contention that Jones was denied overtime on the day of December 14, 1967, because of a shortage of packaging materials which condition was not remedied until January 23, 1968. I find that he was discriminatorily denied overtime work on December 14, 1967. It is noted, however, that he did receive overtime pay for an hour and a half that day, which was for the time spent in Barrie's office before he clocked out. I also find that Barrie's statement to Jones that he would move up in position if he were for the Company constitutes interference, restraint and coercion within the meaning of Section 8(a)(1) of the Act and an interference with the election.

Employee Joe Whitney was employed as an oven loader. On the morning of December 14, he was ill and arrived at work at 12 o'clock noon. He observed employe Danny Goroupe wearing a union shirt and asked him if he had any more. Goroupe referred him to Jones who informed him where another shirt was located. During the afternoon break at about 2 p.m. Whitney got one of the shirts and put it on. He was observed a short time later by Ashby who stated "I hope that makes you feel better, Joe." About 10 or 15 minutes later, Supervisor Handler came in and told Whitney, "You punch out at 3:30."

Respondent has a policy of permitting employees, in some instances, the opportunity to make up hours that they have missed from work. The use of this policy is not encouraged since it would in turn encourage tardiness on the part of employees; but due to Respondent's need for productivity, it permits makeup hours where there is a work station available following the end of an employee's regular shift. Such a work station

usually does not exist where second-shift employees take over all available work stations in a particular department.

Although Whitney was told that he was to punch out at the end of his shift at 3:30 p.m. and has never before been told to do so, on the other hand, he has never at any time made up hours that he has lost. During the 17-month period from July 1966 to December 14, 1967, Whitney was late on 13 occasions without any of the time being made up. In his department there is a second shift and no work station was available to him on December 14. Also there is no evidence that he requested or contemplated making up hours lost on December 14, I find that there was no denial of make-up hours to Whitney on December 14, 1967, and therefore no unfair labor practice or interference with the election in this connection. There is no evidence of any denial of overtime or make-up time to Danny Gorospe.

E. *Application of No-Solicitation Rule*

Respondent prohibits solicitation in working areas during working hours, but the wearing of insignia indicating an employee's allegiance was not prohibited. On December 15, 1967, some employees wore insignia for the Union and some against the Union.

Evidence was adduced that on two occasions employees were warned about passing out union literature. On December 14, Barrie was informed by Supervisor Handler that employee Mitsuko Roberts had passed out union literature on the prior day, December 13, as she was waiting in line to punch out at the timeclock. On December 14, Roberts was told to report to the office, and she was informed by Ashby that she had been

observed passing out union literature prior to quitting time; that this was a violation of Company rules. She expressed her thought that it was not a violation of Company rules because she had finished her work for the day. She had attended a speech given by President Ashby from 3:15 p.m. to 3:25 p.m. She was warned by Ashby not to do this again and a note about the incident was placed in a Company file.

On December 15, 1967, Joe Whitney was passing out union literature near the timeclock. As he started walking toward the work area with literature in his hand, Ashby stated to him, "You know better than that Joe. Get out of here and don't come back with that paper.

I find that in each of these occasions Respondent was warning employees against distribution of union literature on Company time and in working areas. Although Roberts had ceased work, she had not punched out, and Whitney was warned against distributing literature inside the plant after he had punched in. I do not find that there has been any discriminatory application of the no-solicitation rule.

There is no evidence that supervisors nor employees distributed antiunion literature on Company time and property.

F. *Changes in Production Bonus and Promise of Wage Increase*

Respondent has given production or incentive bonuses to its employees coinciding with its shutdown for Christmas holidays for approximately 15 years, but the General Counsel contends that in December 1967, Respondent changed the method of computing the bonus and thereby violated the Act.

On October 6, 1967, President Ashby addressed a meeting of employees and informed them as to the basis for computing and distributing the bonus to be paid in December if production goals were met.

Over the years, Respondent has computed bonuses by different methods, but in 1965 and 1966 it paid all empoyees a bonus of 1 day's pay based on the plant's achievement of its production goal. In December 1967, the bonus was also based on the plant's achievement of its production goal, but was distributed among the employees on a percentage basis based on each employee's individual earnings, thus, taking into account absences and individual production; some employees, therefore, received more pay and some received less. Respondent had used a similar method for distribution of bonus in 1957 and 1958.

The Board has held that the institution of a higher bonus ceiling resulting in extra earnings to employees in the face of a representation election constitutes an unfair labor practice.[4] In the instant case we do not have an increase in the bonus itself, but a change in the method by which it is prorated among employees. Rather than being distributed equally to all employees based on rate of pay only, it was prorated based on an individual's own earnings as determined by his rate of pay, attendance and production. I cannot find that a bonus distribution based on these considerations and consistent with a method of distribution that had been utilized in prior years was intended to dissuade employees from support of the Union or constitutes interference, restraint or coercion within the meaning of Section 8(a)(1) of the Act or an interference with the elec-

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[4]*Noma Lites Corp.*, 170 NLRB No. 142, 67 LRRM 1578.

tion. Furthermore, I cannot find that the timing of the announcement regarding the bonus was an unfair labor practice or an interference with the election since Respondent has traditionally given bonuses to coincide with its Christmas shutdown. The election happened to have been set in the same month as the prodution bonus.

At a meeting of employees on November 2, 1967, President Ashby told the employees that a wage survey had been made and that they would receive a wage increase of 10 cents an hour effective October 28, 1967, and that a change in classifications of some of the employees would also be made. The giving of the wage increase in November 1967, is not alleged as an unfair labor practice nor as an interference with the election. The Petitioner acknowledges in objection number 9 that such increases had been a practice in prior years. Ashby also stated, however, that another survey would be made sometime after the first of the year, and if necessary, wage rates would be changed again.

Respondent contends that it was aware that the Federal minimum wage was to be changed on February 1, 1968, and it anticipated that this would occasion a further change in its wage rates. In November 1967, Respondent considered the possibility of making a wage increase that would take into account the change in the Federal minimum wage law due in February 1968. A majority of Respondent's wage committee felt that the additional increase should be made in November along with the increase being given then; but since the representation election was pending, the president and vice president of Respondent overruled the committee on the grounds that any further increase would be a departure from past practice and would make it

vulnerable to an unfair labor practice charge. Respondent chose to postpone any further increase until the effective date of the new law.

Thus, Respondent contemplated making another wage increase in early 1968, and although Ashby did not expressly promise that this would occur, the only accounting for his announcement to them of another survey within such a short period was to convey to employees the expectation of a further increase. I find that by this announcement made while the representation election was pending, Respondent violated Section 8(a)(1) of the Act and interfered with the election.[5]

Prior to 1967, Respondent had a practice of giving each employee a turkey at Christmas. In 1966 some employees requested that the turkey be given at Thanksgiving rather than at Christmas. This was put to a vote of the employees and a majority voted to continue to have the turkey given at Christmas. In 1967, it was suggested that the employees might prefer a ham instead of a turkey. This was put to a vote on November 8, 1967, with a light majority of the employees preferring a ham to a turkey. Respondent then decided to give the employees a choice of ham or turkey. I cannot find that there has been any unfair labor practice or interference with the election in connection with Respondent's Christmas gifts to employees in 1967.

G. *Objections to the Election*

The petitioner did not offer any evidence independently of the General Counsel as to the matters alleged in its objections to the election. Most of the matters set

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[5] *Northwest Engineering Company*, 148 NLRB 1136, enfd. 376 F.2d 770 (C.A.D.C.); *Iowa Pork Company, Inc.*, 148 NLRB 1242.

forth in the objections were also alleged to be unfair labor practices, and I find that Respondent did interfere with the results of the election by conduct found herein to constitute unfair labor practices.

IV. The Effect of the Unfair Labor Practices Upon Commerce

Those activities of Respondent set forth in section III, found to constitute unfair labor practices, occurring in connection with its business operations as set forth in section I, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Upon the basis of the foregoing findings of fact and upon the entire record in this case, I make the following:

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By denying overtime to Laurence Jones on December 14, 1967, because of his union activities, Respondent discriminated against him in regard to hire and tenure of employment, thereby discouraging membership in the Union and thereby engaging in an unfair labor practice within the meaning of Section 8(a)(1) and (3) of the Act.

4. By soliciting and utilizing employees to influence other employees against the Union, Respondent

has engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

5. By conveying to employees the expectation of a further wage increase in the near future, while a representation election was pending, Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

6. By promising an employee that he would move up in position if he were for the Company, Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

8. By the conduct of the Respondent described above in paragraphs 3, 4, 5, and 6, Respondent has improperly affected the results of the representation election conducted on December 15, 1967.

9. Respondent did not deny makeup hours or overtime work to Joe Whitney or to Danny Gorospe on December 14, 1967. In the fall of 1967, Respondent did not promise employees a new production bonus, and did not enforce a no-solicitation rule in a disparate and discriminatory manner, and did not, through an officer employee, promise wage increases or threaten loss of benefits.

10. Except by the conduct referred to in paragraph 8, above, Respondent did not interfere with the results of the election conducted on December 15, 1967, by other conduct alleged in Petitioner's objections.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and that it take certain affirmative action which I find necessary to remedy and to remove the effects of the unfair labor practices and to effectuate the policies of the Act.

It will be recommended that Respondent make Laurence Jones whole for any loss of pay suffered by reason of the denial of overtime work to him on December 14, 1967, by payment to him of a sum of money equal to the difference between the wages he would have received from Respondent absent the discrimination and the amount he actually did receive, with interest thereon at 6 percent per annum as prescribed in *Isis Plumbing & Heating Co., Inc.*, 138 NLRB 716.

Upon the basis of the foregoing findings of fact and conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following:

RECOMMENDED ORDER

The Conolon Corporation, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, or any other labor organization, by denying overtime work to employees or otherwise discriminating against employees in regard to their hire and tenure of employment or any term or condition of employment.

(b) Soliciting and utilizing employees to influence other employees against the Union.

(c) Conveying to employees the expectation of a wage increase in the near future, while a representation election is pending.

(d) Promising employees promotions or other benefits if they are for the Company rather than the Union.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is designed to effectuate the policies of the Act:

(a) Make Laurence Jones whole for any loss of earnings he may have suffered as a result of the discrimination against him in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports and all other records necessary to analyze the amount of backpay due.

(c) Post at its Santa Ana, California, plant, the notice attached hereto marked "Appendix."[6] Copies of said notice to be furnished by the Regional Director

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[6]In the event that this Recommended Order is adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

for Region 21, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof and maintained by it for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 21, in writing, within 20 days from the receipt of this Recommended Order what steps Respondent has taken to comply herewith.[1]

It is recommended that paragraphs 8, 11, and 13 of the complaint be dismissed.

It is recommended that the election which was conducted in a unit of Respondent's employees on December 15, 1967, be set aside and that a new election be directed at an appropriate time by the Regional Director for Region 21. It is recommended that the Petitioner's objections nos. 2, 4, and 8, and all parts of objection no. 3 except that pertaining to the denial of overtime to Laurence Jones, and all parts of objection no. 12 except that pertaining to soliciting and utilizing employees to influence other employees against the Union be overruled.

Dated:

James R. Webster
/s/ James R. Webster
Trial Examiner

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[1]In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 21, in writing, within 10 days from the date of this Order, what steps it has taken to comply herewith."

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 907

THE CONOLON CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-13) is not yet officially reported. The Board's Decision and Order (Pet. App. 14-38) are reported at 175 NLRB No. 9.

JURISDICTION

The judgment of the court of appeals was entered on September 14, 1970. The petition for a writ of

certiorari was filed on October 27, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the findings of the National Labor Relations Board that the employer violated the National Labor Relations Act by denying overtime to an employee because of his union activity, by discriminatorily enforcing a no-solicitation rule to deter union activity, and by promising a wage increase to induce the employees to vote against the union in a scheduled Board election.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix to the petition (Pet. App. 1-2).

STATEMENT

A. The Board's Findings of Fact

In June, 1967, the Board conducted a representation election among the production and maintenance employees at the Santa Ana, California, plant of the Conolon Corporation (the Company) (Tr. 122).[1] Following consideration of the Union's[2] objections to

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[1] "Tr." references are to the transcript of the hearing before the Trial Examiner.

[2] Industrial Union of Marine and Ship Building Workers of America, AFL-CIO.

Company conduct affecting the results of that election, the Board on September 20, 1967, set the election aside and directed that a new one be held (Pet. App. 21-22).

On November 2, 1967, Company President Ashby told the assembled employees that a wage survey had recently been made and that they would receive a wage increase of 10 cents an hour effective October 28. At the same meeting, Ashby further stated that another survey would be made sometime after the first of the year and, if necessary, wage rates would be changed again. (Pet. App. 32; Tr. 114, 116, 143, 190.)

During November, employee Laurence Jones complained to Executive Vice President Barrie about his wages and progress since his recent return to the Company from military duty. Barrie told Jones that jobs were opening up, and that if Jones put his nose to the grindstone, did a good job, and made an attempt to learn the business, there was a future for him with the Company. During the discussion Jones indicated that he had attended union meetings because he was interested in hearing all sides of the story and that he had no feelings at that time one way or the other, to which Barrie replied that he knew Jones had a significant influence among the employees and that, if Jones were for the Company, he would "be able to move up in position." (Pet. App. 6; Tr. 37-39.)

The new election was scheduled for December 15. On December 14, one of the employees brought to the plant some white shirts with the words "Vote Yes" on the back. That afternoon, Jones put on one of the

shirts. Soon thereafter, Barrie confronted Jones and said, "I see you picked your side." Jones replied that he had no other choice at that time. Later in the day, Supervisor Handler told Jones that he was to leave that day at 3:30 p.m., since there was no overtime work because no rods were being shipped from the specialty department.[3] Jones responded that he was being sent home because he was wearing a union shirt, and asked to see Barrie. At their subsequent meeting Barrie told Jones that he had the wrong idea, that he was being sent home because of production, and added that, since there was a shortage of materials with which to construct the metal cases in which the specialty rods were packaged, there was no point in producing rods. During the conversation Barrie told Jones that he would like to see him "take that shirt off." (Pet. App. 2, 27; Tr. 40-45, 159.)

On December 13, President Ashby delivered an anti-union speech from 3:15 to 3:25 p.m. The Company permitted night shift employees, who did not normally commence work until 3:45 p.m., to punch in prior to the meeting. Day shift employees, whose normal quitting time was 3:30 p.m., had not punched out when the speech commenced. Following the speech, employee Mitsuko Roberts distributed pro-union literature as she waited in line to punch out at the time clock. A supervisor observed her conduct and reported it to Company officials. The following day Roberts was summoned to Ashby's office and reprimanded for violating the Company's rule prohibiting

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[3] Jones worked as a specialty production man handling custom-built and quality fishing rods (Pet. App. 26).

employee solicitation in working areas during working hours. Ashby warned her not to do it again, and placed a memorandum of the incident in her personnel file. (Pet. App. 18, 30; Tr. 116-118, 120-121, 158.)

On December 15, the day of the election, several girls from the Company's clerical staff, dressed in high boots and mini-skirts, distributed anti-union literature in the vicinity of the plant time clock, at service entrances, and in the cafeteria. The distributions occurred at the beginning of the first shift at 7 a.m., during the lunch period from 11:30 a.m. to 12:30 p.m., and at the beginning of the second shift at 3:45 p.m. The girls wore signs stating, "Yes on mini, no on union"; "be sharp, vote no" and "look sharp, vote no." (Pet. App. 23-24, 18; Tr. 24, 112-113, 136-138, 193-194.)

The Union lost the second election. It filed objections to the election results as well as unfair labor practice charges which were consolidated for hearing. (Pet. App. 20-21.)

B. The Decisions Below

The Board found that the Company violated Section 8(a)(1) of the Act by promising Jones a promotion if he supported the Company against the Union, and Section 8(a)(3) and (1) by denying overtime to Jones on December 14 because he supported the Union (Pet. App. 28). The Board rejected the Company's explanation that Jones was denied overtime because of a material shortage. (Pet. App. 27-28.)

The Board found an additional Section 8(a)(1) violation because employee Roberts was disciplined for distributing union literature. Since the Company had permitted its clerical employees to distribute anti-union literature the next morning at the same location while a shift was punching in, the Board held that, the no-solicitation rule was discriminatorily invoked against Roberts to discourage her union activity (Pet. App. 18). The Board further concluded that, although the granting of the 10-cent wage increase in November was lawful since it was in conformity with the Company's past practice, the announcement of another wage survey at the time violated Section 8(a)(1), since it constituted a departure from past practice and was intended "to convey to employees the expectation of a further increase" and thereby to influence their vote in the scheduled election (Pet. App. 33).[4]

The Board ordered the Company to cease its unlawful conduct, to make employee Jones whole for any loss of overtime pay he may have suffered, and to post appropriate notices, and set aside the election (Pet. App. 19, 36-38). The court of appeals, in all respects material here (see n. 4, *supra*), sustained

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[4] The Board also found that the Company violated Section 8(a)(1) of the Act by soliciting and utilizing its office clerical employees to distribute anti-union literature to bargaining unit employees, and by a coercive statement made to an employee by one of the clericals while she was distributing anti-union literature (Pet. App. 15-17). The court of appeals overturned these findings (Pet. App. 11-13), and they are not in issue here.

the Board's findings and conclusions, and enforced its order (Pet. App. 3-13).

ARGUMENT

Petitioner's challenge to the Board's order presents essentially only evidentiary issues, and further review is thus unwarranted. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

1. Contrary to petitioner's assertion (Pet. 8-13), the Board's finding of discriminatory application of the no-solicitation rule does not conflict with *National Labor Relations Board* v. *United Steelworkers*, 357 U.S. 357. There, the Court held that discriminatory application of a rule barring union solicitation by employees during working time is not established merely because the *employer*, by himself or through his supervisory personnel, engages in anti-union solicitation during working time. Nothing in that holding forecloses a finding of discrimination where, as here, the employer permits one group of *employees*, here its clerical employees,[5] to engage in anti-union solicitation during working time, while reprimanding other employees, here employee Roberts, for engaging in pro-union solicitation under similar circumstances.

2. Petitioner challenges (Pet. 13-17) the Board's finding that the announcement of another wage survey was unlawful as in conflict with *National Labor*

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[5] The employees engaging in anti-union solicitation admittedly did so as employees and not as agents of the employer. See Pet. App. 10.

Relations Board v. *Exchange Parts Co.*, 375 U.S. 405. The announcement of the new survey, the Company argues (Pet. 16), was motivated by the scheduled change in the Federal minimum wage law effective February 1, 1968. The employees, however, were not given this explanation for the new survey, which was contrary to past practice (Pet. App. 32-33; Tr. 143-144). In these circumstances, the Board was warranted in finding that the announcement was in fact motivated by a desire to induce the employees to vote in the Board election against the Union.*

3. Petitioner further contends (Pet. 18-22) that the court below improperly relied on a history of prior interferences with employee rights which had not been finally adjudicated to sustain the Board's unfair labor practice findings. In assessing the Company's motivation for the wage survey announcement, the court remarked that "the record indicates that there was a background of employer interference with the rights of employees" (Pet. App. 6). But the court's opinion makes clear that this reference was merely to the fact that the first election had been set aside following objections by the Union to the Company's pre-election conduct, and that the Company had subsequently engaged in other actions here found to be

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* *National Labor Relations Board* v. *Gotham Industries*, 406 F. 2d 1306 (C.A. 1), on which petitioner relies (Pet. 14), is factually distinguishable. There, the court found it doubtful that the employer knew a Board election was imminent, and that, in view of the employee threats to leave and the tightening labor market, valid business reasons existed for putting the wage increase into effect immediately. 406 F. 2d at 1310-1312.

unfair labor practices. The unfair labor practice findings with respect to Jones, which petitioner here faults, plainly are grounded upon the ample record evidence summarized above, and not upon prior unadjudicated unfair labor practice charges.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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